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IN THE  
**Supreme Court of the United States**

October Term, 1983

LYMAN MEADE FLINN,  
Petitioner,

v.

COMMONWEALTH OF VIRGINIA AND  
VIRGINIA DEPARTMENT OF PERSONNEL  
AND TRAINING,  
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

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Counsel for Petitioner

## QUESTIONS PRESENTED

1. Whether the plaintiff has stated a claim cognizable under the United States Constitution and upon which relief may be granted.

2. Whether the plaintiff's material allegations, taken as admitted, show the deprivation of a "property" or "liberty" interest under the due process provisions of the Fourteenth Amendment.

3. Whether the plaintiff's material allegations, taken as admitted, are sufficient to establish a First Amendment claim.

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**October Term, 1983**  
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No.

**LYMAN MEADE FLINN,**  
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v.

**COMMONWEALTH OF VIRGINIA AND**  
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**AND TRAINING,**  
**Respondents.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES**  
**COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**PETITION FOR WRIT OF CERTIORARI TO THE**  
**UNITED STATES COURT OF APPEALS FOR THE**  
**FOURTH CIRCUIT**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

### OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia was not reported. The opinion of the Fourth Circuit Court of Appeals is unpublished. Both opinions are contained in the Appendix to this petition.

### JURISDICTION

The Fourth Circuit Court of Appeals entered judgment on December 22, 1983. This petition for certiorari was filed within 90 days of that date.

This Court has jurisdiction under 28 U.S.C. 1254(1).

### THE STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article, III, Section 2, Clause 1:



Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; --to all Cases affecting Ambassadors, other public Ministers and Consuls; --to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; --to Controversies between two or more States; --between a State and Citizens of another State; --between Citizens of different States, --between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

**First Amendment:**

**Religious and political freedom.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

**Fourteenth Amendment:**

**Section 1. Citizens of the United States.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**28 U.S.C. § 1254**

§ 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

**28 U.S.C. § 1343**

§ 1343. Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

28 U.S.C. § 2201

§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

U.S.C. § 1983

**§ 1983. Civil action for deprivation of rights.**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

**§ 2.1-110 Code of Virginia, 1950, as amended**

**§ 2.1-110. Short title; purpose -** This chapter shall be known and may be cited as the "Virginia Personnel Act."

The purpose of this chapter is to ensure for the Commonwealth a system of personnel administration based on merit principles and objective methods of appointment, promotion, transfer, layoff, removal, discipline, and other incidents of State employment.

**§ 2.1-111. Code of Virginia, 1950, as amended**

**§ 2.1-111. Appointments, promotions and tenure based upon merit and**

fitness. - In accordance with the provisions of this chapter all appointments and promotions to and tenure in positions in the service of the Commonwealth shall be based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications by the respective appointing authorities.

#### STATEMENT OF THE CASE

The Plaintiff filed a Complaint in the United States District Court for the Eastern District of Virginia, Richmond, Division, seeking a declaratory judgment and injunctive relief under 28 U.S.C.

2201. Jurisdiction was claimed pursuant to 28 U.S.C. 1343(3) and 2201, 42 U.S.C. 1983, and the First and Fourteenth Amendments of the United States Constitution.

The Complaint was filed against the Commonwealth of Virginia and its Department of Personnel and Training.

Although the plaintiff was employed by the Virginia Department of Highways and Transportation, the employee evaluation system complained of was established for state agency use by the Department of Personnel and Training. The Complaint alleges that the rating system, because of its failure to provide standards or guidelines to permit the objective assessment of job performance based upon the four subjective performance criteria used, constitutes a denial of due process in that the evaluation system is impermissibly vague on its face and, in its application, was used against the plaintiff in an adverse, arbitrary and capricious manner.

The District Court ruled on August 3, 1983, that the Complaint failed to state a claim upon which relief may be



granted. The ruling was affirmed by per curiam decision of the United States Court of Appeals for the Fourth Circuit on December 22, 1983.

#### REASONS FOR GRANTING THE WRIT

The plaintiff has stated a claim cognizable under the United States Constitution and upon which relief may be granted.

Plaintiff's pleadings, while perhaps inartfully drawn, nevertheless set out the required indicia to establish a justiciable case or controversy within the intendment of the Declaratory Judgment Act, 28 USC 2201, and within the meaning of Article III of the United States Constitution. He has specifically alleged that during the course of his employment the expression by him of certain social and political views, together with statements relating to

job conditions, have resulted in adverse ratings of job performance affecting his present and future employment and constituting a denial of due process and freedom of speech. This Court said in Maryland Casualty Co. v. Specific Coal and Oil Co., 312 U.S. 270, 273 (1941) that "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

The plaintiff does not here seek adjudication of only a political question, nor does he ask merely for an advisory opinion, nor have the questions sought to be adjudicated been mooted by

subsequent developments. See Flast v. Cohen, 392 U.S. 83 (1968). Furthermore, the evaluations under the rating system complained of are of a continuing nature and it is not conjectural that other occasions might arise when such ratings will again be unconstitutionally applied. Cf. Golden v. Zwickler, 394 U.S. 103 (1969). The allegations in the pleadings are sufficient to establish that the plaintiff has been harmed by the challenged agency action and that he was "adversely affected" or "aggrieved", and the fact that reference was made to others similarly situated does not prevent the invocation of federal jurisdiction so long as the plaintiff was among those affected. See United States v. SCRAP, 412 U.S. 669 (1973); Linda v. Richard, 410 U.S. 614 (1973).

Cf. Worth v. Seldin, 422 U.S. 490 (1975);  
O'Shea v. Littleton, 414 U.S. 488 (1974).

This Court acknowledged in Linda v. Richard, supra, that recent decisions of the Court have greatly expanded the categories of injury that may be alleged in support of the federal court's exercise of jurisdiction. The plaintiff has specifically claimed that pejorative (unsatisfactory performance) ratings were given him by a state agency under unconstitutionally vague criteria as a direct result of his exercise of free speech, all of which has impacted adversely upon his employment in matters such as job retention, merit and other raises, and likelihood of promotion. Yet the evaluation criteria are so vague and ambiguous that they cannot serve as clear and specific guidelines for

compliance by employees. The rating procedures giving rise to the 1977 and 1980 performance evaluations complained of are found in "The Performance Evaluation - A Handbook for Managers," submitted in the District Court proceedings as Attachment A and a part of the record below. Upon a performance rating of less than 2.75, the minimum requirement for satisfactory performance, a process is initiated which could result in ultimate termination. Furthermore, in accordance with the guidelines established in the Personnel Division Memorandum, which was submitted in the District Court as Attachment B and made part of the record below, the evaluation is not grievable unless the employee can meet the almost impossible burden of showing that the evaluation was arbi-

trary or capricious.

For purposes of a motion to dismiss for failure to state a claim, courts must accept as true all material allegations of the complaint and must liberally construe the complaint in favor of the plaintiff. E.g., Worth v. Seldin, supra at 501-502; Jenkins v. McKeithen, 395 U.S. 411 (1969). "The complaint should not be dismissed unless it appears that appellant could 'prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson, supra at 45-46." Jenkins v. McKeithen, supra at 421-422. See also United States v. Lovett, 328 U.S. 303 (1946). No such finding can be made from the Complaint or the documents part of the record.



Plaintiff's material allegations, taken as admitted, show the deprivation of a "property" or "liberty" interest under the due process provisions of the Fourteenth Amendment.

In determining from the Complaint alone that the plaintiff was not deprived of a property or liberty interest, the Court of Appeals has placed primary reliance upon Bishop v. Wood, 426 U.S. 341 (1976) and Board of Regents v. Roth, 408 U.S. 564 (1972). However, in Board of Regents v. Roth, the only question presented was whether the respondent had a constitutional right to a statement of reasons and hearing on the university's decision not to rehire him for another year. The state made no charge against him which was injurious to his integrity and did not impose upon him any disability that would prevent his freedom to take advantage of other employment opportu-

nities. That case is quite distinguishable from the facts alleged here, where the plaintiff specifically charges that the 1977 and 1980 performance evaluations adversely affected his employment opportunities.

The dissents of Justices Douglas and Marshall are particularly compelling and bear directly on the issues here presented. Justice Marshall took the position that the prior decisions of this Court established a principle that federal and state governments and governmental agencies may not act arbitrarily "with respect to employment opportunities that they either offer or control" and that such employers are not free to act capriciously or unreasonably with respect to employment practices. In arguing that employment,

and the opportunity to work, is a valuable property right, he said government agencies must demonstrate that their actions are fair and equitable and that procedural due process guarantees protection against arbitrary, capricious and unreasonable government action.

"With respect to occupations controlled by the government, one lower court has said that 'the public has the right to expect its officers. . . to make adjudications on the basis of merit.

The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse.' Hornsby v. Allen, 326 F.2d 605, 610 (CA5 1964)."

Dissenting opinion at page 590.

In Bishop v. Wood the issue was the termination of employment of a policeman by a city manager without affording him a hearing to determine the sufficiency of the cause for his discharge. The Court, acknowledging that a "property" interest in employment could be created by an implied contract, held that such claim must be determined by reference to state law and that, upon a construction of the applicable state law, no such property interest existed. In deciding that no "liberty" interest was deprived, the Court determined that the petitioner's interest in his good name and integrity was not impaired by the discharge. In the instance case, however, the allegations of the Complaint are sufficient to establish a claim that the plaintiff's reputation, integrity, and

job security were, in fact, impaired by the pejorative ratings and the motivation to penalize him for constitutionally protected conduct, namely, the expression of his views. Furthermore, the plaintiff is a state employee with tenure and an implied contract for continued employment. See 2.1-110 et seq. Code of Virginia, 1950, as amended. Arbitrary and capricious actions by the state employer precluding advancement and merit increases, and restricting job opportunity, can be equally as severe as discharge.

Justice Brennan, dissenting (with Justice Marshall concurring), argued that a liberty interest is involved where future employment is affected or threatened because of governmental action and, as to the nature of the



employment, the issue is whether it is "objectively reasonable for the employee to believe he could rely on continued employment." Justice Brennan found that the procedural safeguards of due process are available to protect against ill-advised personnel decisions of government agencies that have pervasive influences upon the lives of those affected thereby. "Petitioner seeks no more than that, and I believe that his 'property' interest in continued employment and his 'liberty' interest in his good name and reputation dictate that he be accorded procedural safeguards before those interests are deprived by arbitrary or capricious government action." Dissenting opinion at page 354.



Plaintiff's material allegations, taken as admitted, are sufficient to establish a First Amendment claim.

When read as a whole, plaintiff's Complaint sets forth more than a merely conclusory allegation of free speech denial. The plaintiff's claim is that he was penalized for expressing certain social and political views and for protesting to his supervisors as to certain unfair or wasteful job conditions, which views gave rise to his adverse ratings. Certainly, it cannot be suggested that by reason of his state employment he is compelled to relinquish his First Amendment rights, nor by reason of such employment is he restricted from comment upon matters the constitutional protection of which others enjoy. See, e.g., Pickering v. Board of Education, 391 U.S. 563 (1968).

". . .statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. Garrison v. Louisiana, 379 U.S. 64 (1964); Wood v. Georgia, 370 U.S. 375 (1962)." Pickering v. Board of Education, supra at 574. Furthermore, there is no suggestion whatsoever in the record that the plaintiff's expression of his views contributed to the disorderly administration of his agency or created any disruption at all. "The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of

Regents, 385 U.S. 589, 605-606 (1967). Compare also Arnett v. Kennedy, 416 U.S. 134 (1974), where this Court held, incidentally, that there was a statutory expectancy of employment by the government employee adversely affected.

The Court of Appeals' reliance on Heller v. Roberts, 386 F.2d 832 (2nd Cir. 1967) is misplaced. In Heller the court held in a per curiam decision dismissing the complaint that the action was one for slander and more properly should have been brought in tort under state law. For the reasons stated above, the plaintiff has stated a claim cognizable under the Constitution.

#### CONCLUSION

This case presents important questions of constitutional law relative both to the justiciability of

claims and to the degree of government conduct required before a property or liberty interest is deprived. Review of the opinion and judgment of the Court of Appeals is timely, appropriate and necessary. This petition should be granted.

Respectfully submitted,

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804/282-5656  
Counsel for Petitioner

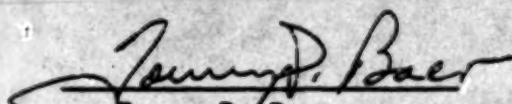
#### CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari with Appendix have been served by mail to Leonard L. Hopkins, Jr., Assistant Attorney General, Commonwealth of Virginia, Supreme Court Building, 101 North

25

Eighth Street, Richmond, Virginia,

23219, this 16th day of March, 1984.

  
Tommy P. Baer

**APPENDIX TO**  
**PETITION FOR WRIT OF CERTIORARI**



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App. 2

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. 83-1841

Lyman Meade Flinn,

Appellant,

v.

Commonwealth of Virginia,  
Virginia Department of  
Personnel and Training,

Appellee.

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Appeal from the United States District  
Court for the Eastern District of  
Virginia, at Richmond. Robert R. Merhige,  
Jr., District Judge. (C/A No. 83-0144-R)

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Submitted: Nov. 1, 1983 Decided: Dec. 22, 1983

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Before RUSSELL and CHAPMAN, Circuit  
Judges and BUTZNER, Senior Circuit Judge.

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(Lyman Meade Flinn, Appellant Pro Se.  
Leonard L. Hopkins, Jr., Assistant  
Attorney General of Virginia, for  
the Appellee.)

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PER CURIAM:

Lyman M. Flinn, an employee of the Commonwealth of Virginia, appeals the district court's dismissal of his action under 42 U.S.C. § 1983 for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). Flinn, represented by counsel in the district court, alleges that the performance evaluation system used by the Commonwealth of Virginia to rate its employees violates due process because it is based on subjective rather than objective criteria. He also alleges that the subjective evaluations inhibit the exercise of free speech because they disadvantage the outspoken employee. Flinn claims that his expression of unpopular views adversely affected his 1977 and 1980 performance evaluations. He

seeks declaratory and injunctive relief.

Neither the Commonwealth's use of subjective criteria in evaluating employees nor Flinn's two unfavorable performance evaluations deprived Flinn of a property or liberty interest, and thus there is no due process claim established. See Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972). Similarly, Flinn's conclusory allegations that his right of free speech has been affected adversely by a subjective evaluation scheme is insufficient to raise a first amendment claim. See Connick v. Myers, 103 S. Ct. 1684, 1690 (1983); Pickering v. Board of Education 391 U.S. 563 (1968).

The Constitution cannot be construed to require federal judicial review of every personnel decision that is made

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by a public agency, and in the absence of a claim that the employer was motivated by a desire to curtail or penalize an employee's constitutionally protected rights, official actions are presumed to be regular. Bishop v. Wood, 426 U.S. at 349-50. In sum, Flinn's broad allegations as to the legal effect of the Commonwealth's employee evaluation scheme fails to state a claim cognizable under the Constitution and was properly dismissed by the district court. See Heller v. Roberts, 386 F.2d 832 (2d Cir. 1967). As the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgment of dismissal.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

LYMAN MEADE FLINN,

Plaintiff

v.

Civil Action No.  
83-0144-R

COMMONWEALTH OF VIRGINIA,  
and VIRGINIA DEPARTMENT OF  
PERSONNEL AND TRAINING,

Defendants.

ORDER

Concluding that the complaint fails to state a claim upon which relief may be granted, upon motion of the defendant and deeming it proper so to do, it is ADJUDGED and ORDERED that the complaint herein stands dismissed.

Let the Clerk send a copy of this order to all counsel of record.

/s/ Robert R. Martine, Jr.  
UNITED STATES DISTRICT  
JUDGE

Date Aug. 3, 1983



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

LYMAN MEADE FLINN,  
Plaintiff

v. Civil Action No.

COMMONWEALTH OF VIRGINIA,  
and VIRGINIA DEPARTMENT OF  
PERSONNEL AND TRAINING,  
Defendant.

COMPLAINT

Plaintiff, Lyman Meade Flinn, by  
counsel, states his case as follows:

I

This is an action for declaratory  
judgment pursuant to 28 U.S.C. 2201,  
for the purpose of determining a  
question of actual controversy between  
the parties, and for injunctive relief  
against the defendant. The jurisdiction  
of this Court is invoked pursuant to 28  
U.S.C. 1343(3) and 2201 and 42 U.S.C.  
1983 as well as under the First, Fourth

and Fourteenth Amendments to the United States Constitution.

II

Declaratory judgment is sought declaring the actions of the defendant, taken under color of state law, to be invalid, illegal, and in deprivation to plaintiff of his rights, privileges and immunities secured to him by the First, Fourth and Fourteenth Amendments to the United States Constitution, and by 42 U.S.C. Section 1983.

III

Plaintiff is a citizen and resident of the Commonwealth of Virginia and is employed by defendant Department of Highways and Transportation where he has worked since September, 1958.

IV

Defendant Commonwealth of Virginia

is one of the United States of America, enjoying all privileges and corresponding responsibilities of that status. It operates a Department of Highways and Transportation as well as a Department of Personnel and Training, the latter of which sponsors a "performance evaluation" system whereby the job performances of virtually all of the Commonwealth's thousands of employees are measured at least annually. Every such employee is, therefore, at least potentially similarly situated to plaintiff.

v

Currently defendant's performance evaluation system consists in a supervising employee grading an inferior employee's conformity with Ten (10) "Performance Factors," each one of which purportedly has to do with job responsibilities, duties or activities of the

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employee being rated; the rating for each performance factor is expressed as a numerical score ranging from a low of one (1) to a high of four (4).

### VI

According to defendant Commonwealth's "Handbook for Managers," published by the Department of Personnel and Training, each of the number scores represents the following-described "performances:"

- 4 - exceeds normal job requirements
- 3 - meets normal job requirements
- 2 - improvement is needed to meet the job requirements
- 1 - fails to meet job requirements

### VII

The individual scores assigned to each of the performance factors are then added together and divided by ten to derive the rated employee's average score. Upon achievement of an average

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rating of 2.75 depend such vital matters as job retention, merit and other raises, likelihood of promotion and so forth his rating is conducted, generally, on an annual basis.

### VIII

Because the defendant has never established scientifically validated performance standards based on job analyses to permit the accurate assessment of the individual's job performance objectively, every such performance evaluation is so inherently subjective as to deny plaintiff and all others so rated due process of law.

### IX

Defendant's performance appraisal system, as constituted, provides no objective standards whereby the rater may be guided in the all-important



annual assessment of his/her workers' performance on the job.

X

The resulting scores, gross and average, thus reflect solely the unharnessed opinion of the rater in matters central to the rated employees', and plaintiff's, employment. Where the rating employee has or may have some professional or personal grudge, or merely a distaste for, the employee subject to his/her rating, then there obviously resides a vast potential for abuse of the rights of the party evaluated, for which reason the system, as constituted, is unconstitutionally arbitrary and capricious as applied and on its face.

XI

Moreover, neither plaintiff nor



any other employee of defendant Commonwealth who is aggrieved by an unfavorable rating, or, conceivably, by a favorable rating which, however, is insufficiently so, has access to the Commonwealth's grievance procedure to protest the disturbing rating, unless the injured party can, in some unspecified way, show that the rating was the product of arbitrariness or caprice.

## XII

The unpopular or the outspoken employee, or the one who deviates from the accepted standards for "fitting in" to the system may be fatally disadvantaged by his/her subjection to the aforescribed scheme for performance evaluation. Plaintiff has, over the course of his work with the defendant Department, expressed his views publicly

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on a variety of pressing social and political issues, and he has also protested to his supervisors verbally what he deemed inefficient, unfair or wasteful job conditions.

### XIII

Such protected activity by plaintiff, given the inadequacy of the performance assessment scheme utilized by defendant, has affected adversely past ratings of plaintiff. Until objective standards for work measurement are introduced into the workplace by defendant, plaintiff's and others' future employment is similarly jeopardized.

### XIV

For the foregoing reasons, defendant's scheme for evaluating employment performance is arbitrary, capricious and void on its face as

denying plaintiff, and all others similarly situated procedural and substantive due process of law and freedom of speech. Plaintiff's right to sell his labor is too important a matter to be abridged or denied based on the sort of subjective judgments encouraged by defendant's performance evaluation system.

XV

The acts of defendant in sponsoring and maintaining the above-described job evaluation system or scheme constitute an illegal deprivation of plaintiff's rights under color of law, in violation of 28 U.S.C. 1343(3) and 42 U.S.C. 1983. Plaintiff is therefore entitled to declaratory judgment declaring these acts of defendant to be invalid, illegal, and in deprivation of those rights, privileges and immunities secured to plaintiff

and others similarly situated by the United States Constitution and 42 U.S.C. Section 1983.

WHEREFORE, plaintiff prays that this Court will:

(A) Declare the acts of defendant in maintaining and using the presently constituted performance evaluation system under color of state law and in passing on the qualifications of plaintiff and others on the job to be illegal, invalid and in deprivation of rights, privileges and immunities under the Constitution of the United States, 42 U.S.C. Section 1983, both on its face and as applied.

(B) Declare any further use of the fatally tainted evaluation scheme as to plaintiff or anyone else similarly situated to be invalid, illegal and in deprivation of the rights, privileges

and immunities of plaintiff and such others.

(C) Declare that any past unacceptable service ratings now in plaintiff's personnel records are invalid, illegal and to be purged immediately since they constitute a deprivation of rights, privileges, and immunities secured him under the United States Constitution.

(D) Enjoin this defendant from any further reliance upon or use of the tainted performance evaluation scheme until a system utilizing scientifically based job analyses is available to provide objective and fair work measurement of all employees' performances.

(E) Affirmatively enjoin defendant to perform such analyses and to establish objective standards if they choose to have an employee evaluation

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system.

(F) Protect plaintiff from retaliation by defendant, its agents, attorneys and/or employees.

(G) Award plaintiff such other and further relief as the Court may deem just and necessary, including his attorney's fees and costs, and issue all other orders necessary to implement the relief ordered by the Court.

LYMAN MEADE FLINN

/s/ Lyman Meade Flinn

/s/ William J. Doran, III

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